APPENDIX

Excerpts From Record, Briefs and Opinions Below in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419

(References are to the volume and page of the Printed Record.)

Excerpts From Stipulation

ARTICLE II

FAILURE TO REGISTER UNDER, EXEMPTIONS FROM, AND VIOLATIONS OF, THE ACT

5. *Failure to Register under the Act.*

Bond and Share, the holding defendants and the holding-operating defendants, having been advised by counsel that the Act, in their opinion, is unconstitutional, and that registration thereunder

> "would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights. The future of the company would be so clouded as to make it very difficult, if not impossible, for it to function effectively, pending the time that the Commission made some order, rule or regulation which would be sufficiently broad to permit a general challenge of its powers, and determination of the company's rights;"

(plaintiff and cross-defendants admitting only that responsible counsel so advised the defendants and expressly deny-

ing concurrence in counsel's opinion) have not registered with the Commission pursuant to Section 5 of the Act, and they have stated that they do not intend voluntarily so to register. (Vol. II, p. 268.)

* * * * * *

"8. *The Attorney General.*

The Attorney General has not instituted, nor has he threatened to institute, nor has he been requested to institute civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act, and he does not intend to institute such proceedings, at least until the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding and after receipt of a request from the Commission to institute such proceedings. In the event that Sections 4 and 5 of the Act are finally adjudicated to be constitutional in this proceeding, the Attorney General will not institute civil or criminal proceedings against the defendants or any of them, or against their directors, officers, agents or employees for any violation of the Act committed by them or any of them prior to the date of such adjudication. On November 21, 1935, the Attorney General publicly disclaimed any intention of instituting criminal proceedings for violations of the Act prior to an adjudication by the Supreme Court of the United States of the constitutionality thereof, and requested all United States Attorneys to act accordingly, by means of two written circulars transmitted to them and dated November 21, 1935 and December 7, 1935, respectively. Exhibits 2 and 3 are copies of such circulars." (Vol. II, p. 271.)

"9. *The Postmaster General.*

The Postmaster General has not excluded, nor has he threatened to exclude, nor has he been requested to exclude from the mails matter sent or attempted

to be sent by the defendants or any of them in violation of the Act, and, whatever may be his authority under the Act, does not intend to exclude the defendants or any of them from using the mails for the transmission of matter in violation of the Act, at least until the constitutionality of Sections 4 and 5 of the Act is finally adjudicated in this proceeding. The Postmaster General has not threatened to request and will not request the Attorney General nor any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for using the mails in violation of the Act, at least until the constitutionality of Sections 4 and 5 of the Act has been finally determined in this proceeding. In the event that Sections 4 and 5 of the Act are finally adjudicated to be constitutional in this proceeding, the Postmaster General will not request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees, for any use of the mails, declared to be unlawful under the Act, which occurred prior to the date of such final adjudication. On December 4, 1935, the Postmaster General publicly disclaimed any intention of excluding any holding company from using the mails in violation of the Act, at least before the validity of the Act is judicially determined by the Supreme Court and by a letter of that date instructed all postmasters to act accordingly. Exhibit 4 is a copy of such letter." (Vol. II, p. 272.)

"10. *The Commission and the Members of the Commission.*

* * * * * *

B. The Commission has not, nor have the Members of the Commission, instituted or threatened to institute or requested the Attorney General or any United States Attorney to institute any civil or

criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act, except that the Commission has instituted this proceeding against certain of the defendants for the relief prayed in the amended and supplemental bill of complaint herein. Neither the Commission nor the Members of the Commission will institute or request the Attorney General or any United States Attorney to institute any further civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents, or employees, at least until such time as the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding. In the event that Sections 4 and 5 of the Act are adjudicated to be constitutional in this proceeding, neither the Commission nor the Members of the Commission will request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act which occurred prior to the date of such adjudication. On November 22, 1935, the Commission publicly announced, by means of a written press release delivered to the newspapers and press services, that, at least for the immediate future and until further notice, the Commission did not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act. Exhibit 6 is a copy of such press release." (Vol. II, pp. 273, 274.)

Stipulation—Exhibit 2

Circular to United States Attorneys

DEPARTMENT OF JUSTICE
Washington, D. C.

November 21, 1935.

CIRCULAR No. 2780

To All United States Attorneys

The Public Utility Holding Company Act of 1935 makes specified transactions by the use of the mails or instrumentalities of Interstate Commerce illegal for certain public utility holding companies after December 1, 1935, unless such companies are registered with the Commission.

The Edison Electric Institute, a trade organization, whose membership includes a number of utility holding companies, has announced that it has retained counsel to contest the constitutionality of the Act. Consequently, it is probable that a number of companies will fail to register under the Act.

It is, of course, not the purpose of the Government to harass the utility industry with a needless multiplicity of suits. Equally, however, there is no public interest to be served by vexing the Government with a multiplicity of injunction suits which might embarrass and harass the Government in defending the constitutionality of the Act and which might result in the presentation of the issue of constitutionality on the basis of an inadequate record or a record not fairly typical of the situations covered by the Act.

Section 18 of the Act places the duty of investigating violations of the Act upon the Securities and Exchange Commission, which may transmit evidence "to the Attor-

ney General, who, in his discretion, may institute the appropriate criminal proceedings."

In enforcing the Act it is proposed promptly to institute civil proceedings against one or more large and important companies who may fail to register to enforce compliance with its provisions and to seek decisions from the Supreme Court sustaining the validity of the Act. In the meanwhile it is not proposed to institute criminal proceedings, and if later it should become necessary to institute criminal proceedings against any company, it is not the intention of this department to seek to exact penalties for earlier offenses which might unduly penalize the investors in the offending company.

In view of the foregoing, the Department suggests that you refrain from bringing or threatening to bring any criminal proceedings under the Act. If any injunction proceeding is instituted against you, you will thus be in a position to disclaim any present threat of any criminal proceeding under such Act. Such disclaimer should be sufficient to dispose of any restraining order which may be sought against you under the authority of *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, decided April 29, 1935; *Sparks* v. *Mellwood*, 74 F. (2d) 695 (C. C. A. 6th, 1934); *Richmond Hosiery Mills* v. *Camp*, 74 F. (2d) 200 (C. C. A. 5th, 1934); *Campbell* v. *Medalie*, 71 F. (2d) 671 (C. C. A. 2d, 1934); *McKee* v. *Rudolph*, 12 F. (2d) 148 (C. A. D. C., 1926); *Cave* v. *Rudolph*, 287 F. 989 (C. A. D. C., 1923).

You will promptly inform this Department, nevertheless, of any action which may be instituted in your District, whether or not you are made a party, to attempt to test the validity of the Act.

HOMER CUMMINGS,
Attorney General.

(Vol. IV, pp. 641-643.)

Stipulation—Exhibit 3

Circular to United States Attorneys

DEPARTMENT OF JUSTICE
Washington, D. C.

December 7, 1935.

CIRCULAR No. 2786

To All United States Attorneys

1.) In Circular No. 2780, November 21, 1935, you were advised that the Government would promptly institute civil proceedings to enforce compliance with the Public Utility Holding Company Act of 1935; that in accordance with the discretion vested in the Attorney General under section 18(f) of that Act, the Attorney General would not sanction the institution of criminal proceedings for violations of the Act before the validity of the Act was judicially determined by the Supreme Court, nor would he thereafter sanction the exaction of penalties for prior offenses; and that you should refrain from bringing or threatening to bring any criminal proceedings under the Act.

2.) On November 26, the Government instituted a civil suit in the Southern District of New York against Electric Bond and Share Company and five of its principal subsidiary holding companies to enforce compliance with the Act, and shortly thereafter consented to the intervention in that suit of sixteen additional subsidiary holding companies in the Electric Bond and Share system. The major issues concerning the constitutionality of the Act, in so far as such issues may legally be raised at this time, will be promptly, effectively, and fairly tested and adjudicated in this suit.

3.) The Attorney General and the Securities and Exchange Commission have taken the position, on the authority of *Union Pacific R. R. Co.* v. *Public Service Commission,* 248 U. S. 67; *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, that registration does not constitute a waiver of any constitutional rights. In its Holding Company Act, Release No. 22, November 22, 1935, the Securities and Exchange Commission reiterated that "the Commission under its rule-making power expressly permits the registrant to reserve his constitutional rights," and further announced that "the Commission is prepared to go further and accept a notification that expressly stipulates that the notification of registration will at the option of the registrant be deemed void if registrant's reservation of its constitutional rights is adjudged void or ineffective."

4.) Despite the efforts of the Government to test the validity of the Act in an orderly and economical manner, and in the meanwhile to safeguard every legal and constitutional right of the private interests affected, not only have a multitude of unnecessary suits been brought against government officials, but a number of stockholders' suits have been brought against various companies with a view to testing the constitutionality of the Act in proceedings in which the Government or its officers are not even parties. In light of the action taken by the Government to safeguard the rights and interests of both registering and non-registering companies, it may be questioned whether such stockholders' suits are brought in good faith and are free from collusion as is required under Equity Rule 27 as interpreted by the Supreme Court. *Corbus* v. *Gold Mining Co.,* 187 U. S. 455; *Wathen* v. *Jackson Oil & Refining Co.,* 235 U. S. 635. It is true that there are cases where in the absence of collusion a stockholder has been allowed to sue

to enjoin the payment of an allegedly unconstitutional tax where the company is threatening to pay the tax without protest and thereby (under the law then in force) threatening to deprive itself of any opportunity of subsequently recovering the tax. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1. But such cases are not at all comparable to an action by a stockholder to enjoin the simple act of registration which involves no waiver of any constitutional right. The only other cases where such stockholders' suits have been permitted, *Smith* v. *Kansas City Title and Trust Co.*, 255 U. S. 180, and *Hill* v. *Wallace*, 259 U. S. 44, are similarly inapplicable, for in each, if the statute challenged were unconstitutional, the action of the Directors sought to be enjoined was unlawful under state law or a clear abuse of their powers of management.

5.) The Government takes the position that any action by a stockholder to enjoin or to compel registration cannot bring into issue the question of constitutionality, but at most only the question of the good faith and prudent conduct of the management. The Government at the present time does not plan to intervene or take any part in any action brought by a stockholder to test the constitutionality of the Act.

6.) Inasmuch as it will in many cases be impossible for the District Attorneys to know of the existence of these suits, you are requested to bring this circular to the attention of the Circuit Judges in your circuit and to the District Judges in your district so that they may be apprised of the Government's position in the event that any such stockholders' suits come before them.

HOMER CUMMINGS,
Attorney General.

(Vol. IV, pp. 644-647.)

Stipulation—Exhibit 4

Circular to Postmasters

OFFICE OF THE POSTMASTER GENERAL,

Washington, December 4, 1935.

The Public Utility Holding Company Act of 1935 makes it unlawful for certain holding companies to use the mails for specified purposes after December 1, 1935, unless such companies are registered with the Securities and Exchange Commission. It is probable that a number of such holding companies will not register under the act.

The Attorney General in Department of Justice Circular No. 2780, sent to all United States attorneys on November 21, 1935, and the Securities and Exchange Commission in its Holding Company Act, Release No. 22 of November 22, 1935, have announced that it is not the intention of the Government to institute criminal proceedings under the act pending the authoritative adjudication of civil proceedings which will promptly be instituted by the Government under section 18 (f) of the act against one or more representative companies to compel compliance with the act.

Whatever may be the authority, if any, of the Postmaster General to exclude from the mails matter sent in violation of the act, the Postmaster General does not intend to exclude any company from using the mails, at least not before the validity of the act is judicially determined by the Supreme Court. You will accordingly take no steps to exclude unregistered holding companies from the use of the mails.

JAMES A. FARLEY,
Postmaster General.

(Vol. IV, p. 648.)

Stipulation—Exhibit 6

Press Release of the Commission

Nov. 22, 1935

The Securities and Exchange Commission today officially authorized the issuance of the following statement:

(1) The Public Utility Holding Company Act of 1935 makes specified transactions by the use of the mails or instrumentalities of Interstate Commerce illegal for certain public utility holding companies after December 1, 1935, unless such companies are registered with the Commission. To date the number of notifications of registration filed under the Act has been negligible. The Edison Electric Institute, a trade organization, whose membership includes many public utility holding companies subject to the Act, has announced that it has retained counsel to contest the constitutionality of the Act.

(2) Section 18 of the Act authorized the Commission to enforce compliance with the Act. And it is the purpose of the Commission to proceed promptly with the administration and enforcement of the law.

(3) However, it is the purpose of the Commission to proceed with the enforcement of the Act in an orderly and economical manner. The Commission will not harass the industry with a multiplicity of suits. And the Commission will resist any effort that may be made to vex the Government with a multiplicity of suits or to provoke litigation with a view of presenting the issue of constitutionality on the basis of an inadequate record or a record not fairly typical of the situations covered by the Act.

(4) If there is a general failure to register under the Act, the Commission will proceed promptly to bring civil proceedings against one or more large and important companies who may fail to register to enforce compliance with the Act and to seek decisions from the Supreme Court sustaining its validity. In the meanwhile, at least for the immediate future and until further notice, the Commission does not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act. The Commission understands that the Attorney General has sent a circular to District Attorneys setting forth the attitude of the Department of Justice.

(5) Counsel for the Commission is firmly of the opinion that registration does not constitute a waiver of any constitutional right which the registering company may have. And the Commission under its rule-making power expressly permits the registrant to reserve his constitutional rights. The Commission is prepared to go further and accept a notification that expressly stipulates that the notification of registration will, at the option of the registrant, be deemed void if registrant's reservation of its constitutional rights is adjudged void or ineffective. No possible ground in reason remains for any company to fail to file a simple notification and registration under these circumstances as a sheer precautionary matter for the protection of its investors. (Vol. IV, pp. 650, 651.)

Excerpts From Amended and Supplemental Complaint

"XVIII

That the defendant Electric Bond and Share Company, in the ordinary course of its business, by constant use of the mails or means or instrumentalities of interstate commerce, in its own name or through Ebasco Services, Incorporated, is and will be continuously engaged in taking steps in the performance of its existing service contracts with the utility companies in the Electric Bond and Share System. That in such contracts, defendant Electric Bond and Share Company, in its own name or through Ebasco Services, Incorporated, for an agreed rate of compensation based upon total monthly operating revenues, undertakes to render extensive services, and the operating public utility agrees to accept such services and to pay for the same. That more specifically such contracts provides:" (Vol. I, p. 42.)

[Here follow paragraphs XIX to XXIII, inclusive, pp. 42 to 62, describing in detail the services rendered, concluding with the allegation on page 62 as follows:]

"That the performance for compensation of the services described in this paragraph constitutes a business in interstate commerce, and that defendant Electric Bond and Share Company, both in its own names and through its wholly owned subsidiaries Ebasco Services, Incorporated, and Phoenix Engineering Corporation, although not registered under the Act, will continue to engage in such business in interstate commerce in violation of Section 4(a)(5) of the Act."

Excerpts From Answer of Defendants Electric Bond and Share Company, American Power & Light Company, and Others (Counterclaim and Cross-Bill)

"42. In the course of their business, defendant Bond and Share and its subsidiary service company, Ebasco Services Incorporated, and the holding company and operating company defendants use the United States mails and the facilities of commerce for various lawful purposes, including the transportation of their officers and employees and the transmission of lawful matter affecting the business of said companies and not in any way tending to impair the safety, health or morals of any person; said matter does not endanger the mails or the facilities of transmission thereof or the facilities of commerce, nor is such matter calculated to, nor does it, defraud or otherwise injure or offend the sender or recipient thereof, or any other person or corporation, directly or indirectly." (Vol. I, p. 157.)

[Here follow quotations from the Act, and the following:]

"The activities forbidden by paragraphs (3), (4) and (6) of said Section 4(a) are essential to the normal and ordinary conduct of the business of each of the defendants and the use, conversation (*sic* error for "conservation") and development of its properties. It is essential and necessary that each of the defendants, to maintain the integrity of its property and investments, own, control and hold with power to vote, the securities of its subsidiary companies which do the things prohibited in paragraphs (1) to (5), inclusive, of said Section 4(a) as and to the extent hereinbefore alleged." (Vol. I, p. 159.)

* * * * * *

"An unregistered holding company which engages in any of the transactions prohibited by Section 4(a) is within the purview of the following provisions of Section 26(b):

[Quoting Section]

"Each of the defendants has existing many contracts, relationships and practices, the performance of which involve violations of provisions of said Act, and which may also be subjected to rules, regulations or orders of plaintiff Commission which would likewise be violated. Among such contracts and relationships are those between defendant Bond and Share's wholly-owned subsidiary, Ebasco Services Incorporated, and others of the defendants and their subsidiaries for the performance of services, and like arrangements between defendant American Gas and its subsidiaries. Such contracts and relationships are of value to the parties thereto, and their termination would result in monetary losses, and losses in economy and efficiency of operation." (Vol. I, pp. 161, 162.)

* * * * * *

"(6) The provisions of Section 4(a)(2) and (6) of said Act which prohibit defendants Bond and Share and American Gas, as unregistered holding companies, by use of the mails or any means or instrumentality of interstate commerce, from taking any step in the performance of any service, sales or construction contract or from owning securities of any subsidiary company taking any such step and the provisions of Section 13(a) and (b) of said Act which prohibit said defendants after April 1, 1936, from taking directly any step in the performance of any such service, sales or construction contract or from taking any such step through a subsidiary company except at cost, and then only in accordance with terms, conditions and limitations prescribed by plaintiff Commission, destroy contract rights, presently threaten to disrupt and de-

stroy the valuable service organizations now maintained by said defendant American Gas and by defendant Bond and Share's wholly-owned subsidiary company, Ebasco Services Incorporated, and will deprive said defendants of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States." (Vol. I, pp. 181, 182.)

[The Cross-Bill concludes with a prayer for injunctions, both temporary and permanent, against the enforcement of the Act or any of the provisions thereof (Vol. I, pp. 198-200).]

Excerpt From Reply of Securities and Exchange Commission, Its Members, Attorney General and Postmaster General to Cross-Bill

"Plaintiff and cross-defendants deny that the Attorney General threatens or intends to institute criminal proceedings against the defendants or any of them, and deny that the Postmaster General intends or threatens to prevent the defendants from using the mails in the conduct of their business, but allege, on the contrary, that it is the intention of the Securities and Exchange Commission and the Attorney General and Postmaster General to institute no proceedings of any kind or nature whatsoever against the defendants or any of them or their officers, directors or employees to enforce the provisions of Section 4(a) of the Act or of any other section of the Act other than the proceeding instituted by the plaintiff herein, until such time as the Supreme Court of the United States shall have determined the constitutionality of said Act in this proceeding." (Vol. I, p. 251.)

Excerpts From Findings of Fact and Conclusions of Law of District Court

"64. Other than sections 4(a) and 5(a), the provisions of the Act (with minor exceptions not material to this cause) apply only to registered holding companies and their subsidiary companies. Each defendant is a non-registered holding company, and as such, no provision of the Act, other than the provisions of sections 4 and 5(a) of the Act, is applicable, can be applied, or has been threatened by the plaintiff or any cross-defendant or any other officer or agency of the United States, to be applied to any of them.

"65. The filing by the plaintiff of its bill of complaint in this proceeding and its prosecution of this proceeding constitute the sole act, conduct, or threat by the plaintiff or any cross-defendant or any other officer or agency of the United States to enforce the Act or any part thereof or any rule, regulation, or order thereunder against the defendants or any of them or against any subsidiary company or affiliate of any defendant, or any director, officer, employee, or agent of any defendant. Such act, conduct, and threat are solely in respect of the civil enforcement of the provisions of sections 4(a) and 5 of the Act and of the rules and regulations thereunder against the thirteen defendants; and they do not constitute any act, conduct, or threat to enforce, or to exact or inflict any penalty for the violation of, any other provision of the Act or any rule, regulation, or order thereunder. The defendants are in no danger at the hands of the plaintiff or the cross-defendants, or any of them, before a final decision by the Supreme Court—the plaintiff and each of the cross-defendants having made public announcement (prior to and at about the time of the commencement of this proceeding) and having stipulated therein that no steps would be taken, until a final decision by the Supreme

Court, because of failure to comply with the Act, and that even after such decision no penalties would be sought for earlier offenses; all as specifically set forth in the stipulation of facts (R. 641-651). The Court takes judicial notice of the fact that the plaintiff Commission has made a number of rules, regulations and orders applicable to registered holding companies and their subsidiaries including regulations regarding a system of accounts and regulations regarding service, sales, and construction contracts. But neither the plaintiff Commission nor the cross-defendants have taken or threatened any civil or criminal proceedings against any registered holding company or any subsidiary company thereof for failure to comply with the provisions of the Act, or any rule, regulation, or order thereunder applicable to registered holding companies or subsidiary companies thereof.

"66. The defendants have offered no evidence to support a finding, and the record is without any facts which could support a finding, that any defendant or any subsidiary company of any of them has suffered or is suffering any irreparable or substantial damage, impending or threatened, by reason of any act, conduct, or threat of the plaintiff or any cross-defendant or any other officer or agency of the United States, or by reason of the existence of the Act or any provision thereof or any rule, regulation, or order thereunder. Until the provisions of the Act other than sections 4(a) and 5 become applicable to the defendants, neither they nor their subsidiary companies show any irreparable or substantial injury, impending or threatened. * * *" (Vol. VIII, pp. 2249-2251.)

* * * * * *

"18. In so far as the cross-bill attempts to raise any issue in respect of, or seeks any relief from, the provisions of the Act applicable to non-registered holding companies (i.e., sections 4(a) and 5),

the issues have been determined on the bill of complaint and the answer thereto; and the defendants and intervening defendants have no need, and are not entitled, to a determination of any such issue on the cross-bill." (Vol. VIII, p. 2258.)

* * * * * *

"20. In so far as the cross-bill attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies, the cross-bill must be dismissed because there has been no threat or act by the plaintiff or any cross-defendant to enforce any such provision of the Act against any defendant or any intervening defendant, and there is no danger or justifiable fear of any such threat or act. In these circumstances, the defendants and intervening defendants fail to make out any case or controversy with the plaintiff or any cross-defendant regarding any such issue." (Vol. VIII, pp. 2258-2259.)

Excerpts From Opinion of District Court

"We come then to the question of the validity of the registration provisions, that is, of secs. 4(a) and 5. They are unconstitutional, defendants contend, because they are not a regulation of interstate commerce or of the mails. The argument is that the information required to be filed under sec. 5 has no relation to and will not constitute a regulation of the acts forbidden to unregistered holding companies by sec. 4(a). It is further contended that some of the acts forbidden by sec. 4(a) do not constitute interstate commerce.

"The question is as to the power of Congress to forbid public utility holding companies to do the acts enumerated in sec. 4(a) unless they first register and file the information required of registered companies by sec. 5.

> "*Although subsidiaries which themselves are not holding companies are not forbidden to do any of the acts enumerated, holding companies of subsidiaries which commit those acts are made responsible therefor by sec. 4(a) (6).* Such acts of subsidiaries are thus material in considering the validity of paragraph (6)." (Emphasis supplied.) (Vol. VIII, p. 2191.)

* * * * * *

Here follows a discussion seriatim of the different paragraphs of Section 4(a) (pp. 2191-2207) and of the activities of the defendants thereunder, including the services of Ebasco Services Incorporated to operating subsidiaries of the Bond and Share System, concluding as follows:

> "Sec. 4(a) (6) forbids unregistered holding companies 'to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.' Inasmuch as paragraph (5) is not involved in this case, the question is whether Congress may validly require registration by and information from holding companies if any of their subsidiaries do any of the acts enumerated in paragraphs (1) to (4), acts which it may constitutionally forbid to be done by the holding companies themselves. Sec. 2(a) (7) defines a holding company as 'any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company'. But a company holding the prescribed percentage of stock in another company may apply to the Commission for an order that it is not a holding company, and the Commission must so declare if it 'finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more

other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised. * * *' Corresponding provisions are made as to subsidiary companies, in sec. 2(a) (8). Not only have defendants not applied for exemptions under these provisions, but they assert in their answer that they are not entitled to apply for exemptions. It is therefore admitted, for the purposes of the Act, that defendant holding companies control their respective subsidiaries.

"Paragraph (6) is an essential part of the regulations in the registration provisions, if the other paragraphs of sec. 4(a) are to have any appreciable effect. Without it, it is only necessary for any holding company to transfer its activities to its subsidiaries in order to escape the regulations. A good example of how this might be done is provided in the organization of Ebasco, and the transfer of its service contracts and facilities by Bond and Share to this 100% owned subsidiary. As to the activities normally carried on by subsidiaries, it is entirely reasonable that a controlling holding company be made responsible for them. When there is control, as admittedly prevails here, it is the holding company which in any real sense, causes the activities to be carried on. The statute thus but recognizes and gives effect to the practical situation. In *Federal Trade Com.* v. *Smith, supra,* a public utility holding company was held to be engaged in interstate commerce and therefore subject to federal regulation because of its control of its subsidiaries. The problem of disregarding or piercing through the corporate entities is not here involved; the Act, without denying the separateness of the corporations as such, charges the holding company with responsibility for those interstate activities which, by virtue

of control, it causes the subsidiary to engage in." (Vol. VIII, pp. 2207-2209.)

* * * * * *

"As a basis for injunctive relief, irreparable injury must be shown to be impending or threatened. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89 (1935). But until the Act becomes applicable to cross-plaintiffs, they show no such injury. The provisions of the Act other than the registration requirement apply only to registered companies.

"Although the decree to be entered, directing a cessation of the activities forbidden by sec. 4(a) until registration, will, if ultimately sustained, probably result in registration, some months at least will necessarily elapse before this is done. The stipulation recites that each defendant which is a holding company is violating 'one or more provisions of sec. 4(a) of the Act, and, unless otherwise ordered by a final decree not thereafter reversed or vacated, intends to continue, without registering, to engage in such activities and transactions'. Since the defendants intend to secure a review of these proceedings, it is clear that they will not register unless and until they are required so to do by decision of the Supreme Court. Therefore, the regulations pertaining to registered holding companies will not affect them for at least some time.

"Cross-plaintiffs are in no danger at the hands of cross-defendants or any of them before a final decision by the Supreme Court; there has been public announcement that before such decision, no steps would be taken because of failure to comply with the Act and that penalties will even then not be enforced or action leading thereto taken by any of cross-defendants, because of the earlier failure to comply therewith." (Vol. VIII, pp. 2211, 2212.)

Excerpts From Opinion of Circuit Court of Appeals, 92 F. (2d) 580, at Page 591

"By Section 4(a)(6) an unregistered holding company may not lawfully own, control or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs 1 to 5, inclusive, of this subsection. A ten per cent. stock ownership creates a presumption of control. The Act provides (§ 2(a)(8)) that the Commission upon application shall declare a company not to be a subsidiary company if it finds that it in fact is not controlled by the holding company. By Section 2(a)(7) [fol. 2335] any company that is prima facie a holding company under the Act can rebut the presumption by showing that in fact it does not control subsidiary utility companies. The presumption provided for is neither arbitrary nor unreasonable as Congress could find upon the report of the Federal Trade Commission.* Practical control is often exercised and retained, through the ownership by those who are already in managerial control of a substantial minority of the voting power. The majority stock is not necessary for control. United States *v.* Union Pac. Ry. Co., 226 U. S. 61, 95-96.

"By Section 4(a)(6) Congress has not attempted to disregard the corporate entity of any corporation. The provisions of the Act which regulate the relations between the holding company and its subsidiary take into full account the existence, separation and protection of such entities. Congress has found that in certain situations the proper regulation of interstate commerce and postal activities of the subsidiary requires the regulation of the controlling company. 'It is with the system that the law must deal, not with its elements.' So. Pac. Terminal Co. *v.* I. C. C., 219 U. S. 498, 523." (Record in Supreme Court, pp. 2329-2330.)

* 70th Congress, First Session, Senate Document 92, para. 72-a, p. 143.

Excerpts From Briefs Filed in the Supreme Court on Behalf of Securities and Exchange Commission, the Attorney General of the United States and the Postmaster General of the United States

"If defendants believe that the registration provisions of the Act are unconstitutional, it is their privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, to perform service, sales, and construction contracts, to make 'upstream loans,' to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions. But, having deliberately chosen to insulate themselves for a substantial period of time from the application of the very provisions of the Act which they now seek to attack in their cross-bill, surely defendants cannot be heard to complain if the result has also been to prevent any justiciable controversy over such provisions from arising." (Brief for Respondents, Securities and Exchange Commission, et al., pages 208-209.)

* * * * * *

"V. DEFENDANTS' THREATENED VIOLATIONS OF SECTIONS 4(a)(1),(2),(3),(4), AND (6)

"For the convenience of the Court, we summarize briefly the acts done or threatened by each of the several defendants which constitute violations of section 4(a) as found by the District Court.

* * * * * *

"2. SECTION 4(a)(2) AND (6)

"Bond and Share directly owns securities of its subsidiary companies Ebasco and American Gas, which by use of the mails and channels of interstate commerce perform service, sales, and construction contracts for public-utility companies (R. 2237-2245, findings 50-56). The services now being performed by these three subsidiaries have already been described in this Factual Summary (pp. 75-101, 108-122, *supra*). Bond and Share is continuously violating section 4(a)(6) by reason of the fact that these subsidiary companies are continuously doing the acts described in section 4(a)(2)." (Appendix B to Brief for Respondents, Securities and Exchange Commission, et al., pages 122-123.)

[Statements in almost identical language also appear in the briefs filed on behalf of Securities and Exchange Commission, the Attorney General and the Postmaster General both in the Circuit Court of Appeals and in the District Court.]

Stipulation Dated March 31, 1938, Made in the District Court After the Decision of the Supreme Court in *Electric Bond and Share Company* v. *Securities and Exchange Commission*

[Title of Court and Cause]

Whereas this cause was instituted by the Securities and Exchange Commission in the United States District Court for the Southern District of New York for the purpose of procuring final adjudication by the Supreme Court of the United States of the constitutionality of the Public Utility Holding Company Act of 1935 (hereinafter sometimes called the "Act") or such part thereof as might be presently presented for such final adjudication, and in an effort to present the constitutionality of the entire Act, the defendants herein filed a cross-bill against the above named Attorney General of the United States, Postmaster General of the United States and individual members of the Securities and Exchange Commission; and

Whereas in order to avoid the necessity of multiplicity of suits, preliminary injunctions and procedural embarrassments, the Attorney General of the United States, the Postmaster General of the United States and the members of the Securities and Exchange Commission publicly announced prior to the bringing of this suit, and stipulated herein (stipulation of facts, record, Article III, pp. 271-277) that they would not institute or request the institution of civil or criminal proceedings against the defendants or any of them or against their directors, officers, agents or employees for any violation of the Act committed by them or any of them prior to the date of the final adjudication of the constitutionality of Sections 4 and 5 of the Act; and

WHEREAS by decree of the said District Court entered herein on the 6th day of March, 1937, the cross-bill of the defendants was dismissed, and an injunction was allowed against each of certain of the defendants therein named as prayed for in plaintiff's amended and supplemental bill of complaint "commencing on the thirtieth day after the day of this decree and continuing until such defendant shall cease to be a holding company as defined in section 2(a) (7) of the Public Utility Holding Company Act of 1935 or shall register with the plaintiff as provided in sections 4(a) and 5(a) of said Act"; and

WHEREAS it was further provided in said decree that if an appeal should be taken prior to the effective date of said injunction "the said injunction shall be stayed as to the appealing defendants without further bond or supersedeas order, pending the determination of said appeal either by the Circuit Court of Appeals or by the Supreme Court of the United States, if it shall be there removed by certiorari or other process, and until thirty days after filing of the mandate of the appellate court in this Court"; and

WHEREAS it was the intention of the parties expressed through their counsel in framing said decree to allow to certain defendants a period of thirty days after the entry of judgment on the mandate of the Supreme Court of the United States by the District Court to accomplish registration, as in effect required by said decree, in an orderly manner, without subjecting any of the defendants, or any of their directors, officers, agents or employees to contempt proceedings for violation of the injunction, or to civil or criminal proceedings for violations of the Act committed before the termination of said period of thirty days; and

WHEREAS a question has arisen as to the meaning of the term "final adjudication" or equivalent terms as used in Article III of the stipulation of facts as above referred to

and the construction of the decree in connection with said stipulation;

THEREFORE, it is hereby stipulated and agreed by and between the plaintiff and cross-defendants through their counsel that the term "final adjudication" or equivalent terms as used in said Article III of said stipulation shall be construed as referring to the effective date of the injunction provided for in the decree, to wit, thirty days after the entry of the judgment by the United States District Court for the Southern District of New York upon the mandate of the Supreme Court of the United States, and that there shall not be instituted civil or criminal proceedings against the defendants or any of them, or against their directors, officers, agents or employees or any of them, for any violation of the Act committed by them or any of them prior to the expiration of thirty days from the entry of said judgment upon said mandate.

It is further stipulated and agreed that defendants waive the issuance of a writ of injunction on the decree, and said decree shall be fully effective and binding on defendants subject thereto, according to its terms, without the issuance of such writ.

This stipulation may be filed in the District Court for the Southern District of New York in connection with the entry of the judgment on the mandate and shall have the same effect as if incorporated in said judgment or in the decree in this cause.

Dated, March 31, 1938.

ROBERT H. JACKSON
Solicitor for Plaintiff and Cross-Defendants

SIMPSON THACHER & BARTLETT

JOHN F. MACLANE
Solicitor for Defendants

Excerpts From Public Utility Holding Company Act of 1935

"Section 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection."

"Section 20. * * *

(d) The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may authorize the filing of any information or documents required to be filed with the Commission under this title, or under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or either of such Acts. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

"Section 26. * * *

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or en-

gaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order."

"Section 27. (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder."